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LIABILITY FOR UNREASONABLY AND UNAVOIDABLY UNSAFE PRODUCTS: DOES NEGLIGENCE DOCTRINE HAVE A ROLE TO PLAY?

JOSEPH A. PAGE*

INTRODUCTION

To what extent, if any, should courts hold defendants liable for harm caused by hazards associated with the unduly and unavoidably dangerous aspects of goods they produce and market?

Where manufacturers might have eliminated unreasonable risks arising from the manufacture or design of a product, or from the information (or lack thereof) conveyed by a product's labeling, the tort system traditionally has provided injured victims with an opportunity to obtain compensation for injuries attributable to these risks.¹ Moreover, even where risks from manufacturing or construction defects could not have been eliminated with the exercise of reasonable care, the courts have permitted plaintiffs to recover under a theory of strict tort liability.²

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1. See generally 1 M. STUART MADDEN, *PRODUCTS LIABILITY* §§ 4.1-4.13 (2d ed. 1988) (negligence as basis for manufacturers' liability); MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶¶ 5.01-5.09 (1987) (same).

Unreasonable risks have been defined as dangers that outweigh the utility of the conduct that creates them. See *RESTATEMENT (SECOND) OF TORTS* § 291 (1977). Thus, due care would require the taking of precautions that would have cost less than the foreseeable accident costs. See Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (cost of precautions measured by expense of making activity safer or benefit foregone by eliminating or curtailing activity).

2. See MADDEN, *supra* note 1, § 9.6.

Although most courts also hold manufacturers strictly liable in tort for defective design and for inadequate warnings or instructions for use, some commentators have argued that plaintiff's burden in such cases is often either identical or very close to the burden she would have to meet in order to establish negligence. See Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 645 (1980); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 271-78 (1990); see also David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L.

But suppose no warning or change in design could have made the product reasonably safe, and the only way the risk in question could have been eliminated was by keeping the product out of the stream of commerce.³ In such cases, the dangers to be avoided were inherent in

REV. 743; William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 777-78 (1983).

The major distinction said to separate strict liability from negligence in design cases is that in the latter plaintiff must establish that defendant knew or should have known of the risk that ought to have been eliminated by an alternative design, while in strict liability knowledge of risks is imputed to manufacturers. See Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1244-45 (1993); Keith Miller, *Design Defect Litigation in Iowa: The Myths of Strict Liability*, 40 DRAKE L. REV. 465, 484-86 (1991); Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process*, 38 VILL. L. REV. 1361, 1423-30 (1993).

However, the proposition that manufacturers may be liable for failing to design out unknowable risks is generally found in dictum. See, for example, *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816, 825 (N.J. 1978), stating:

[I]n design defect liability analysis the . . . criterion of 'unreasonably dangerous' is an appropriate one if understood to render the liability of the manufacturer substantially coordinate with liability on negligence principles. The only qualification is as to the requisite of foreseeability by the manufacturer of the dangerous propensity of the chattel manifested at the trial-this being imputed to the manufacturer.

Another example can be seen in *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1037 (Or. 1974), stating:

The question of whether the design is unreasonably dangerous can be determined only by taking into consideration the surrounding circumstances and knowledge at the time the article was sold, and determining therefrom whether a reasonably prudent manufacturer would have so designed and sold the article in question had he known of the risk involved which injured plaintiff.

In the area of warnings, there are a handful of decisions holding that defendant might be liable for failing to warn of unknowable risks. See, e.g., *Hayes v. Ariens Co.*, 462 N.E.2d 273 (Mass. 1984); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 547-549 (N.J. 1982). However, most courts require plaintiffs in strict liability cases to prove that defendant knew or should have known of the risk. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 697 (5th ed. 1984).

For other examples of holdings that impose upon plaintiffs in strict liability design and warnings cases a lesser burden than that which they would have to bear in negligence cases, see *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 457-558 (Cal. 1978) (burden placed on defendant to show that utility of product as designed outweighed risks); see also *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549, 559 (Cal. 1991) (dictum that in strict liability warnings cases plaintiff not required to show that defendant's failure to warn of known or knowable risk was unreasonable).

Some jurisdictions permit plaintiffs to recover in strict tort upon proof that the design of the product did not satisfy the reasonable expectations of the ordinary consumer, a test that might impose strict liability upon some nonnegligent manufacturers. See, e.g., *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794, 798 (Wis. 1975). For a sympathetic discussion of the consumer-expectations test, see F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

For an exhaustive survey of state law on design-defect liability, see John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

3. An inherently dangerous product might be reasonably safe in the proper hands. Courts have imposed a duty on sellers to use due care in distributing products that might foreseeably cause harm if certain classes of people consumed or used them. See MADDEN, *supra* note 1,

the nature of the product. Eliminating these dangers would have necessitated a decision not to have manufactured the product in the first place.

Whether liability should be imposed for unavoidable product risks has been an issue at the core of a spirited polemic, during the last decade-and-a-half, about how courts should respond to suits seeking to hold the makers of handguns liable in tort to plaintiffs shot by criminal assailants using these weapons.⁴

Professors Twerski and Henderson have responded to this debate and to scattered decisions imposing per se liability on manufacturers of unavoidably dangerous products other than handguns.⁵ They have argued that manufacturers should not be legally responsible for selling products posing either generally known or adequately warned against risks, if at the time of marketing there was no economically and technologically feasible alternative design that might have eliminated those risks without changing the essential nature of the product.⁶

§ 3.17 (liability of retailers for sale of dangerous products to minors under theory of negligent entrustment). At least one court has extended this duty to manufacturers. See *Moning v. Alfonso*, 254 N.W.2d 759, 762 (Mich. 1977) (manufacturer might be liable in negligence for the marketing of slingshots to children). For an argument that manufacturers of handguns should have a duty to use reasonable care to facilitate the control of the distribution of their products to make sure they do not fall into irresponsible hands, see STUART M. SPEISER, *LAWSUIT* 369-72 (1980). For a recent article advocating the use of a theory of negligent marketing and promotion against manufacturers of handguns, see Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 SETON HALL LEGIS. J. 777 (1995).

Manufacturers have a duty of due care to design out dangers that might arise from a product's foreseeable misuses. See MADDEN, *supra* note 1, § 8.4. They may also be liable for failing to warn of dangers from the foreseeable misuse of a product. See *id.* § 10.6.

4. See, e.g., Andrew J. McClurg, *Handguns As Products Unreasonably Dangerous Per Se*, 13 U. ARK. LITTLE ROCK L.J. 599, 600-603 (1991); Philip D. Oliver, *Rejecting the "Whipping-Boy" Approach to Tort Law: Well-Made Handguns Are Not Defective Products*, 14 U. ARK. LITTLE ROCK L.J. 1 (1991); Andrew J. McClurg, *Strict Liability for Handgun Manufacturers: A Reply to Professor Oliver*, 14 U. ARK. LITTLE ROCK L.J. 511, 511-524 (1992); see also Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103 (1991) (arguing that handgun manufacturers should be strictly liable in tort to victims); Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471 (1983) (opposing strict liability); Paul R. Bonney, Note, *Manufacturers' Strict Liability for Handgun Injuries: An Economic Analysis*, 73 GEO. L.J. 1437 (1985) (favoring strict liability); Note, *Handguns and Products Liability*, 97 HARV. L. REV. 1912 (1984) (opposing strict liability).

5. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986) (asbestos); *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983) (above-ground swimming pool with vinyl-covered bottom); see also *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n.5 (Or. 1978) (dictum that jury might find a manufacturer was unreasonable in marketing a highly and unavoidably unsafe product).

6. See James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); see also Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385 (1995) (advocating similar position).

Henderson and Twerski detailed the case against what they termed product-category liability,⁷ a theory that would permit plaintiffs to hold manufacturers or sellers responsible for harm resulting from the decision to market inherently dangerous products. They first took aim at across-the-board liability for any harm caused by risky, nondefective products,⁸ and then defended the position that per se liability should not extend even to unavoidably hazardous products whose dangers were found to outweigh their social benefits.⁹

Moreover, they have sought to incorporate their view into the new *Restatement of Products Liability*, for which they are serving as Reporters.¹⁰ The black-letter provisions of the draft would seem to exclude the possibility of product-category liability.¹¹ However, a comment concedes that there might arise extreme situations, such as where defendant manufactures exploding cigars meant to blow up in the faces of practical jokers' unsuspecting victims, in which courts might impose liability for marketing products with a high degree of risk and a low degree of social utility.¹²

7. The term "generic product risk" has been suggested as an alternative for the type of hazards that might give rise to product-category liability. See Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L. REV. 1, 30 (1995). Product-category risks are unavoidable dangers that are common to an entire class of products, but generic risks may also arise from product-design features that might be altered in a way that would eliminate the unreasonableness of the hazard without changing the essence of the product. Hence, it may perhaps be more accurate to treat product-category risks as a subset of generic product risks. See Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 857 (1983).

8. See Henderson & Twerski, *supra* note 6, at 1276-97.

9. See *id.* at 1297-1314.

10. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY 40 (Proposed Final Draft, (Preliminary Version) 1996):

[C]ourts have not imposed liability for categories of products that are generally available and widely used and consumed, solely on the ground that some persons consider those product categories socially undesirable. Instead, courts have concluded that the issue is better suited to resolution by legislatures and administrative agencies that can more appropriately consider whether distribution of some categories of widely used and consumed products should be controlled or even prohibited altogether.

11. For instance, the liability of commercial sellers is limited, by the *Restatement*, to harms caused by defects in manufacture, design, warnings or instructions for use. See *id.* § 1. Manufacturing defects arise when the "product departs from its intended design." *Id.* § 2(a). A design is defective if the foreseeable risks of harm it creates "could have been reduced . . . by the adoption of a reasonable alternative design." *Id.* § 2(b). Hence, under the new *Restatement*, unavoidably unsafe products cannot be defective, and hence cannot subject their manufacturers to liability.

12. See *id.* § 2 cmt. d & illus. 5. For a criticism of the comment, see Michael J. Toke, *Note, Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORN. L. REV. 1181 (1996). For a discussion of the evolution of the *Restatement's* position on product-category liability, see Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1434-40 (1994).

Supporters of product-category liability, on the other hand, insist on the principle that manufacturers should be accountable for any unreasonable decision to place a product line on the market.¹³ Moreover, they would not apply the rule as a grudging exception invoked only in extreme situations. Rather it would apply to any suit—even one involving widely available products like cigarettes—where plaintiffs claim that the risks generated by the products in question are considerable and their social utility minimal.¹⁴

The debate over per se liability has tended to focus on either controversial consumer products such as cigarettes and handguns, or specialty items of very limited distribution, such as exploding cigars. However, there are other types of products that might conceivably give rise to product-category claims, such as automatic weapons manufactured for sale to the general public,¹⁵ dangerous children's toys,¹⁶ hazardous prescription drugs and medical devices,¹⁷ and risky foods like herbal products.¹⁸

13. For defenses of product-category liability, see Bogus, *supra* note 7; Marc Z. Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 SETON HALL L. REV. 623 (1987); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 671-75 (1995); Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMPLE L. REV. 167, 193-95 (1995); Wertheimer, *supra* note 12. For a more measured and limited approval of product-category liability, see David G. Owen, *The Graying of Products Liability Law: Paths Taken and Untaken in the New Restatement*, 61 TENN. L. REV. 1241, 1253-57 (1994).

14. See Wertheimer, *supra* note 12, at 1440.

15. See Wade Lambert, *Judge Allows Suit Against Gun Maker In 1993 Slaying*, WALL ST. J., Apr. 11, 1995, at B4 (California Superior Court judge refused to dismiss claim by victims against manufacturer of semi-automatic assault pistol used in a shooting rampage).

16. See EDWARD M. SWARTZ, TOYS THAT DON'T CARE 201-51 (1971) (description of toys alleged to have caused serious injury to or death of children).

17. Dangerous drugs and medical devices cannot be marketed without prior approval by the Food and Drug Administration ("FDA"). See 21 U.S.C.A. §§ 355, 360e (1996). The distribution of an unreasonably dangerous unapproved new drug or medical device, or the sale of an unreasonably dangerous new drug or device mistakenly approved by the FDA, might cause harm to a consumer. On the possibility of FDA errors in the approval of new drugs, see Richard A. Merrill, *Compensation for Prescription Drug Injuries*, 59 VA. L. REV. 1, 16 (1973). In addition, Congress could at any time enact legislation depriving the FDA of its authority to license new drugs and medical devices. The sale of a drug or device that reached the market because of a careless judgment by FDA employees, or after Congress repealed or substantially weakened the requirement of pre-market approval by FDA, could result in harm to consumers. In either event, a product-category suit might be filed on the ground that the foreseeable risks of the drug or device outweighed its likely utility.

18. See Sharon Waxman, *Lawsuits Blame Women's Deaths on Unregulated Herbal Products*, WASH. POST, March 24, 1996, at A1, reporting that product-liability suits had been filed alleging that fatal cardiac arrhythmias resulted from the consumption of herbal tea. See also Marian Burros & Sarah Jay, *Concern Grows Over Herb That Promises a Legal High*, N.Y. TIMES, Apr. 10, 1996, at C1, reporting on fatal strokes and heart attacks suffered by consumers of a Chinese herb legally promoted as producing euphoria and heightened sexual sensations. If no warning would have been sufficient to provide reasonable protection against the risks associated with

This illustrative list suggests the possibility of further distinctions, such as a distinction between inherently dangerous products that harm consumers or users aware of the risk and those that primarily victimize innocent third parties; and another distinction between consumers or users who comprehend the danger and those who do not. The argument over whether the manufacturers of unreasonably and unavoidably dangerous products should be liable in tort to plaintiffs harmed by their products up to now generally has ignored these distinctions.¹⁹

The debate over per se liability has also for the most part proceeded on the assumption that the appropriate legal theory in such cases lies in strict tort as it has evolved in the area of products liability.²⁰ Additionally, some advocates of per se liability have urged the courts to utilize the strict tort theory, which imposes liability upon those who engage in abnormally dangerous activities,²¹ or a theory that has been termed ultra-strict or absolute liability, an approach that would hold defendants liable for any and all harm caused by the product.²²

The supporters and opponents of product-category liability have locked horns thus far on two discrete levels. First, as a matter of sound policy, should manufacturers of unavoidably and unreasonably dangerous products be liable at all for harm caused by the risks that make these goods unduly hazardous, no matter which theory of strict liability plaintiffs utilize? Second, are there any compelling reasons why the various strict tort theories do not support the imposition of this kind of liability?

these products and the manufacturers knew or should have known of the danger, claims against these manufacturers would be product-category claims.

19. For an argument supporting a limited strict liability rule, which would permit only bystanders to recover for harm caused by hazardous products used primarily for enjoyment, see Robert F. Cochran, Jr., "Good Whiskey," *Drunk Driving, and Innocent Bystanders: The Responsibility of Manufacturers of Alcohol and Other Dangerous Hedonic Products for Bystander Injury*, 45 S.C. L. REV. 269, 271 (1994).

20. See, e.g., Bogus, *supra* note 7, at 30; Henderson & Twerski, *supra* note 6, at 1297; Wertheimer, *supra* note 12.

21. See Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369 (1987); Rick L. Jeff, Note, *Do Victims of Unlawful Handgun Violence Have a Remedy Against Handgun Manufacturers: An Overview and Analysis*, 1985 U. ILL. L. REV. 967, 986-94.

22. See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993); Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679 (1995). For advocacy of a "refined strict liability rule" that would come close to imposing absolute liability on handgun manufacturers, see Bonney, Note, *supra* note 4, at 1456-57 (manufacturers should be liable for all handgun injuries, including those caused by accidental, non-negligent discharges).

This Article will attempt to expand the debate by considering the extent to which negligence theory may provide a more suitable approach to product-category liability. It will also suggest that under negligence doctrine, the case can more easily and logically be made for denying recovery to consumers or users who are fully aware of a product's inherent risks, but freely choose to encounter them and thereby suffer harm.

The test advocated by most supporters of strict-tort product-category liability would require the balancing of a product's hazards against its utility,²³ which seems indistinguishable from the test that would be used to determine whether a manufacturer acted reasonably in marketing a product.²⁴ The sort of absolute liability its advocates would apply to makers of dangerous products, such as handgun ammunition and cigarettes, is merely a consequence that flows from a prior determination that the product's risks so far outweigh its utility that the manufacturer ought to bear all losses occasioned by them.²⁵ Hence, both forms of per se liability reflect a strong connotation of blameworthiness on the part of the defendant, and negligence theory has been the common law's traditional vehicle for the assessment of blame.

Moreover, strict activity liability was designed to cover situations in which the choice to engage in the activity was reasonable, and has traditionally reserved to negligence theory situations such as those presented in product-category cases, where plaintiff claims that a prudent person would not have engaged in specified conduct.²⁶

If, as this Article will contend, blameworthiness should be the linchpin of product-category liability, it is difficult to justify recoveries by consumers or users who understand the extent of the dangers posed by an inherently risky product and decide to risk them. Innocent third-party victims and users or consumers unaware of or incapa-

23. See, e.g., Bogus, *supra* note 7, at 30 (product-category liability "occurs when a product generically fails a risk-utility test, that is, when a product remains unreasonably dangerous despite the best possible design, construction, and warnings to the consumer.").

24. The generally accepted formula for determining whether conduct is negligent involves a balancing of the utility of the conduct in question against the probability and magnitude of harm it might produce. See KEETON ET AL., *supra* note 2, at 171; see also *supra* text accompanying note 1.

For an effort to distinguish risk-utility balancing in negligence from risk-utility balancing in strict liability, see Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand That Helps or a Hand That Hides?*, 32 ARIZ. L. REV. 77, 102-11 (1990).

25. See Note, *Absolute Liability for Ammunition Manufacturers*, *supra* note 22; see also Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405 (1991).

26. See *infra* note 80 and accompanying text.

ble of appreciating the danger, however, should have a good cause of action in negligence for product-category liability.

Part I will sketch how negligence, strict liability and absolute liability doctrine might apply in the product-category context. Part II will consider the effect, if any, the use of negligence theory might have upon the policy debate over the desirability of imposing product-category liability. Part III will explore the extent to which the use of negligence theory might enable plaintiffs to counter doctrinal arguments that have been raised against the use of strict and absolute liability in product-category cases, and to point out the weakness of a no-liability rule.

I. AVAILABLE TORT THEORIES

An injured person seeking to recover damages for harm inflicted by an unavoidably and unreasonably dangerous product may choose from among several possible causes of action on the torts menu. The most likely are negligence, in its traditional form, and the theory of strict liability employed against the makers of defective, unreasonably dangerous products. Other possibilities include strict liability for abnormally dangerous activities, and absolute liability.

A. Negligence

The contemporary law of negligence begins with the general principle that whenever a person knows or should know that what she is about to do might create an unreasonable risk of harm to another, she has a duty to use reasonable care to avoid creating that risk.²⁷ Courts have tempered this principle by placing limitations upon the legal obligations owed by certain classes of defendants.²⁸ The availability of

27. Leon Green has referred to this principle as the "danger" test. See Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1028 (1928). It originally derived from a proposition put forward by Brett, M.R., in *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883):

[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recogni[z]e that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

28. The duty element in negligence permits courts, as a matter of law, to curtail the responsibilities owed by classes of defendants to classes of plaintiffs. Notable examples are the limited duties owed by possessors of land to various categories of entrants upon the land. See generally JOSEPH PAGE, *THE LAW OF PREMISES LIABILITY* §§ 2.1-3.21 (2d. ed. 1988) (duties owed by a land possessor to trespassers and licensees). Another example may be found in the limits courts have placed on the duty to rescue a stranger in peril. See generally Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REF. 439, 446-64 (1994); Steven J. Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994).

affirmative defenses such as contributory or comparative fault²⁹ and assumption of risk³⁰ may further circumscribe the scope of liability created by negligence doctrine.

The original *Restatement of Torts* postulated that the obligation to use due care extended not only to conduct undertaken by an actor, but also to the choice to engage in the conduct.³¹ The *Restatement (Second) of Torts* reiterated this principle without alteration.³² A comment to this black-letter formulation points out that the unduly dangerous nature of consciously undertaken conduct is determined by weighing the conduct's utility against its risks.³³

Thus, the decision to do an unreasonably dangerous deed may constitute actionable negligence, even though the actor performed it with reasonable care under the circumstances. Similarly, if a defendant had an alternative course of conduct that would not carry with it an unavoidable, undue risk, the failure to exercise that option might constitute negligence.³⁴ If a defendant's choice was between performing the unduly risky activity or abstaining, the decision to act might constitute negligence.³⁵ Likewise, a plaintiff who opts to engage in an activity that subjects her to unavoidable and unreasonable danger,

29. See generally VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* (3d ed. 1994).

30. See generally KEETON ET AL., *supra* note 2, § 68.

31. "A negligent act may be one which involves an unreasonable risk of harm to another (a) although it is done with reasonable care, skill, preparation and warning"

RESTATEMENT OF THE LAW OF TORTS § 297 (1934).

32. See RESTATEMENT (SECOND) OF TORTS, § 297 (1965).

33. See RESTATEMENT OF THE LAW OF TORTS § 297, cmt. b; RESTATEMENT (SECOND) OF TORTS § 297, cmt. b.

34. See, e.g., *Vigneault v. Dr. Hewson Dental Co.*, 15 N.E.2d 185 (Mass. 1938) (finding of negligence by court where dentist chose a dangerous method of anesthetization despite the availability of a reasonably safe alternative).

The existence of a feasible alternative might affect the risk-benefit calculus in that the danger would be weighed against the cost of the alternative, which would include any loss of social utility it would impose, when compared to the option that defendant did in fact exercise. See, e.g., *Kimbar v. Estis*, 135 N.E.2d 708 (N.Y. 1956) (plaintiff claimed operators of summer camp were negligent in not floodlighting path, which campers were using at night; court upheld dismissal of complaint; lighting would have unacceptably diminished the utility of exposing boys to adventure in wild).

35. The decision to engage in a noisy construction project, despite knowledge that female minks whelping nearby might kill their young because of noise fright, might be considered negligent. See *Hamilton v. King County*, 79 P.2d 697 (Wash. 1938).

The theory of negligent entrustment, which holds that a defendant may be liable for failing to exercise due care in entrusting a dangerous instrumentality to someone incapable of handling it without creating unreasonable risks of harm to others, requires courts to pass judgments upon decisions to act rather than decisions not to act. See, e.g., *Dean v. Johnston*, 206 So. 2d 610 (Ala. 1968) (negligent entrustment of motor vehicle to incompetent driver); KEETON ET AL., *supra* note 2, at 197-203. Thus, the decision to permit a child to fly an airplane might be negligent. (For newspaper publicity about a fatal accident taking the life of a seven-year-old girl seeking to set a record as a pilot, see Sam Howe Verhovek, *Girl, 7, Seeking U.S. Flight Record, Dies in Crash*, N.Y. TIMES, Apr. 12, 1996, at A1. Although the girl was not at the controls at the time of

rather than refrain from such activity, may be found contributorily negligent.³⁶

Thus, a potential injurer, in order to avoid potential liability for negligence, would need to consider both the reasonableness of the activity to be undertaken and the reasonableness of the manner in which he engages in the conduct in question.³⁷ If it would be unreasonable to engage in the activity, the person engaging in it might be liable in negligence to persons injured by the risks that made the activity unduly dangerous. On the other hand, if it would be reasonable to en-

the crash, if she had been and an innocent bystander had been injured, a negligence suit for activity-category liability might have been brought.)

The decision to drive a car when the actor knows he may be subjected to a sudden incapacity might be negligent. See KEETON ET AL., *supra* note 2, at 162.

A radio station's decision to sponsor a contest in which teenage drivers chased a disc jockey in response to clues about where to find him and how to qualify for cash prizes might be negligent. See *Weirum v. RKO Gen., Inc.*, 539 P.2d 36 (Cal. 1975).

The decision to pull a chair away from behind a person about to sit on it might be negligent. See *Ghassemieh v. Schafer*, 447 A.2d 84 (Md. Ct. Spec. App. 1982) (but plaintiff not permitted to proceed under negligence theory because instruction based on negligence not requested).

36. The doctrine of unreasonable assumption of risk, in most jurisdictions a subcategory of contributory or comparative fault, arises when a plaintiff voluntarily chooses to encounter a known risk under circumstances where a reasonable person would have opted to do nothing or something different. See KEETON ET AL., *supra* note 2, at 497.

Thus, the decision to dash onto railroad tracks to save a hat might be considered negligent. See *id.*, at 171, citing *Eckert v. Long Island R.R.*, 43 N.Y. 502 (1871), where the court stated "[f]or a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is apt to receive a serious injury, is negligence . . ." *Id.* at 506; see also *Blackburn v. Dorta*, 348 So. 2d 287, 291 (Fla. 1977) (dictum that it would be negligent for tenant to run into blazing premises to save his favorite fedora).

37. Professor Steven Shavell, without citing any authority, has asserted that negligence law does not impose liability for choices to engage in conduct.

By definition, under the negligence rule all that an injurer needs to do to avoid the possibility of liability is to make sure to exercise due care if he engages in his activity. Consequently he will not be motivated to consider the effect on accident losses of his choice of whether to engage in his activity or, more generally, of the level at which to engage in his activity . . .

Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980) (footnote omitted).

In a subsequent book, he conceded that a court might hold a defendant negligent for choosing to engage in an activity if the activity is very risky and involves scant utility to the defendant, even though due care is exercised. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 26 (1987) (citing RESTATEMENT (SECOND) OF TORTS § 297 (1977)). Section 297, however, says nothing about the necessity to show that the activity in question was very risky, or that it involves scant utility. The major point Shavell was seeking to make is that under negligence doctrine, in determining whether an actor breached her duty of care, courts consider only the way an activity is conducted, and not how often the activity is conducted; hence, negligence theory may not deter excessive levels of risky conduct; strict liability, on the other hand, may reduce risky activity levels, since the actor will be liable for any harm caused by the activity and not only harm caused by the manner in which the activity is conducted. Therefore an actor will have an incentive to reduce her activity to an appropriately efficient level.

For a criticism of this thesis, see Stephen G. Gilles, *Rule-based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319 (1992); see also Latin, *Activity Levels, Due Care, and Selective Realism in Economic Analysis of Tort Law*, 39 RUTGERS L. REV. 487 (1987).

gage in the activity, the person engaging in it still might be liable if a court adjudged the activity as abnormally dangerous.³⁸

The imposition of negligence-based tort liability on the manufacturers of unreasonably and unavoidably unsafe products would require proof that a reasonable person in defendant's position, with the knowledge that defendant possessed—or in the exercise of due care should have possessed³⁹—would not have marketed the product.⁴⁰ Such a decision would be warranted if the foreseeable risks of harm from marketing the product would exceed the costs of avoiding that harm, which, in the product-liability context, is measured by the loss of utility that society incurs from the unavailability of the product.⁴¹ As a result, the fact finder would determine what a prudent manufacturer would have decided (and the extent to which a prudent manufacturer would have tested), unless the court determined that reasonable minds could not differ on the issue.⁴²

38. See *infra* notes 78-80 and accompanying text.

39. A defendant who failed to take reasonable steps to test the product for potential dangers would be charged with the knowledge that such tests would have revealed. On the manufacturer's liability for design defects that could have been detected by adequate testing, see MADDEN, *supra* note 1, § 9.8, at 340-41.

40. Some products might not create unreasonable risks if their distribution were limited. Potent medicines sold to the general public might endanger consumers who are unaware of the danger or desire to abuse them. However, since distribution controls, in the form of the requirement of sale by prescription only, might reduce the risks to a tolerable level, the manufacturer's decision to market the goods subject to controls on their distribution might not be unreasonable. If the manufacturer knew or could reasonably have foreseen that available distribution controls do not prevent ignorant or unauthorized persons from exposure to risks generated by the product, this might push the level of risk beyond acceptability.

41. The *Restatement of Torts* posits that the most important element of social utility is "the value which the law attaches to the interest which the [defendant's] conduct is intended and appropriate to advance or protect." RESTATEMENT (SECOND) OF TORTS § 292, cmt. a (1977). The fact that some risk may be inherent in the manufacture of a product does not make that risk unreasonable "because it is believed that the whole community benefits by it." *Id.* It would then seem to follow that if the community on balance suffered detriment from the marketing of the product, this disutility would weigh in favor of a determination that it was not reasonable to put the product into the stream of commerce.

Dean William Prosser reiterated the same point, albeit by implication, in discussing the potential liability of manufacturers of unavoidably dangerous products such as alcohol and pharmaceuticals, when he noted that:

Where only negligence is in question, the answer as to such products is a simple one.

The utility and social value of the thing sold clearly outweighs the known, and all the more so the unknown risk, and there is no negligence in marketing the product.

William L. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

Thus, if the known risks associated with a product clearly outweighed the utility and social value of the product, it would seem to follow from Prosser's statement that a manufacturer would be negligent in marketing the product.

42. See *Moning v. Alfano*, 254 N.W.2d 759, 771 (Mich. 1977) (dictum that trial court should direct verdict for defendant if a plaintiff attempted to impose negligence-based product-category liability on an automobile manufacturer, because the utility of transportation by automobile overrides the risks created by them.).

An unexcused violation of a statute or regulation that makes it illegal to market a product may be per se unreasonable, or at the very least relevant to the issue of whether the defendant's decision was reasonable.⁴³ Compliance with a licensing statute or regulation, however, would not be per se reasonable, but it would be admissible to prove the reasonableness of the decision to market the product.⁴⁴

The imposition of fault-based liability in product-category cases arguably would promote the underlying goals of negligence law. Manufacturers would be deterred from marketing chattels whose foreseeable risks outweigh their social utility, and hence economic efficiency would be promoted.⁴⁵ The manufacture and distribution of unavoidably dangerous goods whose risks outweigh their social utility might offend the community's sense of fairness when those injured by the products are unwary consumers or third-party victims who derived no specific gain from the consumption or use of the particular product in question.⁴⁶

To avoid subjecting marketing decisions to judicial review, a manufacturer might attempt to convince the court to hold that defendant had no duty to exercise reasonable care—or had a duty to exercise less than reasonable care—in deciding whether to market the product. Courts often have used the duty element to narrow general obligations to employ due care when they have been persuaded that policy considerations dictate such a result.⁴⁷ In what may be viewed as a product-category case involving the claim that in the exercise of due

43. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 7(a) (Proposed Final Draft (Preliminary Version) 1996). See also Joseph H. Ballway, Jr., Comment, *Products Liability Based Upon Violation of Statutory Standards*, 64 MICH. L. REV. 1388, 1389 (1966). For a decision holding a retailer absolutely liable for harm caused by the sale of glue to minors in violation of a state statute, see *Zerby v. Warren*, 210 N.W.2d 58 (Minn. 1973).

44. See RESTATEMENT THIRD OF TORTS: PRODUCTS LIABILITY § 7(b) (Proposed Final Draft (Preliminary Version) 1996).

45. For a thoughtful discussion of the deterrence goal of tort law, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 UCLA L. REV. 377, 381-87 (1994).

46. See generally KEETON ET AL., *supra* note 2, § 4, at 21-23 (discussing the relationship between community values and fault-based tort liability).

According to a prominent law and economics scholar, inefficiency, exemplified by the squandering of social wealth that results when harm is inflicted despite the fact that the cost of prevention "[is] a cheaper alternative to the accident," arouses the indignation and moral disapproval of the community. Posner, *supra* note 1, at 33.

For an argument that fault-based liability should protect and promote personal autonomy and equality to the extent it can do so without excessive cost, see David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 719-23 (1992). See also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993) (providing a more detailed discussion of moral fault as the basis for product liability).

47. The California courts have developed the most extensive and sophisticated list of policy factors that might bear upon the limitation of legal duties. They include:

care defendant should not have marketed a record album that allegedly incited plaintiff's decedent to commit suicide, one court held that the right of free speech provided a policy justification for its refusal to recognize a duty that might dampen artistic expression.⁴⁸

Where duty is an issue, courts have the option to hold that a manufacturer making a marketing decision need not use any care, should use ordinary care, or should merely refrain from selling highly risky products with little or no utility.⁴⁹ The recognition of the duty, or the refusal to recognize the duty, should apply to all product manufacturers.⁵⁰ It is conceivable that courts might be tempted to refrain from imposing the duty on the makers of highly useful products, on the ground that imposition of the obligation might deter socially desirable innovation. The proper application of the duty, however, should not impede the development of new, highly useful products. The duty of due care requires the balancing of utility against risks that were known or should have been known, and courts have the authority to direct verdicts on the breach-of-duty issue where a marketing decision took into account a very high degree of usefulness and/or a very low quantum of foreseeable risk.

Under negligence doctrine, plaintiffs also would have to establish that their injuries were in fact caused by the product.⁵¹ In addition, the scope of recovery would be limited to harms resulting from those

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 443 P. 2d 561, 564 (Cal. 1968) (abolishing limited duties owed by land possessors to entrants, and imposing general duty of due care).

48. See *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197 (1988); see also *DeFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982) (holding that the First Amendment barred suit against NBC for recklessly telecasting a stunt that plaintiff's decedent imitated, with fatal consequences); *Walt Disney Prod., Inc. v. Shannon*, 276 S.E.2d 580, 583 (Ga. 1981) (holding First Amendment barred suit against defendant for negligently telecasting an allegedly dangerous method of reproducing sound effects, which when child imitated, resulted in injury).

49. There is precedent at common law for the judicial imposition of less-than-ordinary care duties. For example, courts have held that possessors of land owe adult trespassers an obligation only to refrain from wilful, wanton or reckless disregard of the latter's safety. See *PAGE*, *supra* note 28, § 2.3.

50. If a court were to exempt the manufacturers of some types of goods from product-category liability, it would be inviting those manufacturers subjected to potential product-category liability to mount a constitutional challenge based upon the denial of equal protection. For an example of an unsuccessful challenge in the product-liability context, see *In re Asbestos Litigation*, 829 F.2d 1233, 1244 (3d Cir. 1987) (asbestos producers might be subjected to stricter standards of liability than other manufacturers).

51. See generally *KEETON ET AL.*, *supra* note 2, § 41, at 263.

risks that made the product unreasonably dangerous in the first place.⁵² For instance, in product-category cases involving handguns, liability would extend to gunshot wounds caused by the criminal use of the weapon, but not to the remote risk of traumatic injury caused if the gun fell from a shelf and struck plaintiff.⁵³

Even though a court might find a marketer to have breached the duty of reasonable care and the element of causation satisfied, the availability of affirmative defenses might provide the marketer with either partial or complete exoneration. Plaintiff's failure to exercise reasonable care for his own safety would be a complete bar to recovery in jurisdictions recognizing contributory negligence,⁵⁴ and would reduce plaintiff's recovery in comparative-negligence jurisdictions.⁵⁵ Plaintiff's knowledge of the product's inherent danger and her voluntary decision to encounter that danger might shield defendant from liability in jurisdictions recognizing assumption-of-risk.⁵⁶

In situations where the harm was intentionally, recklessly or negligently inflicted upon an innocent third party by the user of the product, a negligent manufacturer would have an action for contribution against the user.⁵⁷ The possibility, however, that the user might be judgment-proof, combined with the availability of the doctrine of joint

52. This result would be obtained if the court utilized a theory, often referred to as the risk rule, postulating that "the scope of liability should ordinarily extend to but not beyond the scope of the 'foreseeable risks'—that is, the risks by reason of which the actor's conduct is held to be negligent." *Id.* § 42, at 273; see also ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* 18-20 (1963) (stating the policy of the risk rule as limiting scope of an actor's liability to factors that support a finding that actor had acted negligently).

53. Gunshot wounds intentionally inflicted during the perpetration of criminal activity clearly would fit within the scope of the foreseeable risks found to make the decision to market handguns unreasonable. But what about other kinds of gunshot injuries, such as harm from accidental discharges, harm from the use of the weapon in self-defense (either legally justifiable or legally unjustifiable), and even suicide? One approach to the issue is to determine whether the likely risks from criminal discharges are sufficient to make marketing the weapons unreasonable. If so, extending liability to other kinds of foreseeable risks would not change the deterrence effect of potential liability for criminal discharges. Hence, there would be no justification for holding the manufacturer responsible for harm from foreseeable risks that, considered separately, would not be unreasonable.

54. See 2 M. STUART MADDEN, *PRODUCTS LIABILITY*, § 13.4 (2d ed. 1988).

55. See *id.* § 13.13. For a persuasive argument that in products cases the only kind of plaintiff's conduct that should bear upon comparative negligence is conduct based upon specific awareness of a product's hazards, see Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Product Liability*, 39 VILL. L. REV. 281, 348 (1994).

56. See 2 MADDEN, *supra* note 54, § 13.5.

57. On contribution, see generally KEETON ET AL., *supra* note 2, § 50 (discussing different approaches to loss shifting). Some jurisdictions permit contribution on the basis of degrees of fault. See *id.* § 67, at 475-476. Thus, a negligent manufacturer might be able to shift a substantial portion of its liability if the product's user or consumer recklessly or intentionally injured a third-party victim.

and several liability, would reduce the manufacturer's chances of shifting responsibility.⁵⁸

B. Strict Products Liability

The doctrine of strict-tort products liability emerged from section 402A of the *Restatement (Second) of Torts*, which promulgated the black-letter rule holding sellers responsible for harm caused by their defective, unreasonably dangerous products.⁵⁹ Originally applicable to food,⁶⁰ and then to products for "intimate bodily use,"⁶¹ this rule, rather late in its development, was further stretched by drafters to cover all products.⁶² The rule's comments, drafted mainly with comestibles, drugs and cosmetics in mind, were not rethought and revised to address peculiar problems, such as the standard to be used when determining liability in design cases that surfaced when the entire cornucopia of consumer products came within the range of strict tort products liability.⁶³

The *Restatement (Second)* addresses product-category liability in a rather peripheral way. The drafters did consider whether the manufacturers of cigarettes and alcoholic beverages might be liable for unavoidable risks posed by their products.⁶⁴ But the test they adopted for determining unreasonable danger focuses upon whether the product creates hazards that are beyond the contemplation of the ordinary consumer.⁶⁵ Therefore, where a whole category of products poses known, inherent risks, what has come to be known as the "consumer-

58. Under the rule of joint and several liability, the injured plaintiff has the option to collect the entire amount of the judgment against the negligent manufacturer. *See id.* § 47, at 328-30. Thus, the latter would be forced to bear the entire amount of liability if the user had no assets with which to satisfy the judgment.

59. § 402A. Special Liability of Seller of Product for Physical Harm to User of Consumer:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. . . .

RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

60. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961).

61. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962).

62. *See* RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 10, 1964).

63. *See* Page, *supra* note 7, at 860.

64. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 1, § 402A cmt. i (1965).

65. *See id.* This comment elucidated what was meant by the phrase "unreasonably dangerous": "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.*

expectation test" seems to preclude recovery under the new strict-tort theory.⁶⁶

Some commentators argued that strict liability ought to apply even when a product posed unknown and unknowable risks, if a reasonable manufacturer, aware of the dangers at the time the product was in the developmental stage, would have warned against them or opted not to market the product.⁶⁷ This approach would require the use of risk-utility balancing, since a prudent manufacturer presumably would withhold a commodity from the market if its dangers outweighed the social gains it might produce.

Resort to a risk-utility test in these kinds of product-category cases tracked the development of a similar test for defective, unreasonably dangerous design. Although the *Restatement* made no mention of such a standard, commentators and courts found it to be a workable approach to cases in which the product line in question posed a generic hazard that could be eliminated by the adoption of an alternative design.⁶⁸ Some jurisdictions permitted plaintiffs to use either the consumer-expectation or the risk-utility test.⁶⁹

Advocates of strict-tort product-category liability have argued that the risk-utility test should be employed even where there was no alternative design that might have been adopted to avoid an inherent (and known) hazard associated with a type of product.⁷⁰ Their position is that if a reasonable manufacturer would not have marketed the product because the foreseeable harm from it outweighed the societal

66. Despite this preclusion, the drafters included a comment specifically removing from the reach of strict liability "[u]navoidably unsafe products" whose known utility outweighed their risks, so long as the product in question was "properly prepared and marketed, and proper warning [was] given. . . ." *Id.*, § 402A cmt. k. One might logically read into this a willingness on the part of the drafters to impose strict liability (or liability in negligence) upon the maker of an unavoidably unsafe product whose known risks outweighed its known utility.

67. See W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 404 (1970)

([I]f the sale of the product under all the circumstances under which it was marketed subjected the consumer or others to an unreasonable risk of harm, the seller is subject to liability, and it is not relevant that he neither knew nor could have known nor ought to have known in the exercise of ordinary care that the unreasonable risk actually existed.);

John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965) ("assuming that the defendant had knowledge of the condition of the product, would he then have been acting unreasonably in placing it on the market?").

68. For the most influential exposition of the risk-utility balancing test for design defects, see John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973); see also *Troja v. Black & Decker Mfg. Co.*, 488 A.2d 516, 519 (Md. Ct. Spec. App. 1985) (applying Wade's test).

69. See *Ontai v. Straub Clinic & Hosp., Inc.*, 659 P.2d 734, 740 (Haw. 1983); *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 819 (Ohio 1982).

70. See, e.g., Bogus, *supra* note 7, at 30.

advantages it brought, defendant should be strictly liable for harm caused by the product.

The use of strict tort in products liability suits removes from consideration the issue of defendant's fault. The *Restatement (Second) of Torts* states that a seller may be liable even though he "has exercised all possible care in the preparation and sale of his product" ⁷¹ The oft-reiterated mantra that the focus in strict tort is on the condition of the product rather than on the conduct of the manufacturer ⁷² has underscored the need for the jury to pass judgment upon the defectiveness and the unreasonable danger of the product in question, and not upon the reasonableness of anything the manufacturer did or failed to do.

Strict tort liability once helped plaintiffs by restricting affirmative defenses that defendants might assert because the *Restatement* recognized only a limited form of assumption of risk that amounted to a form of contributory fault. ⁷³ The adoption of comparative negligence by courts as an affirmative defense in strict-tort products cases ⁷⁴ has reduced this advantage by permitting defendants to plead other forms of contributory fault in strict liability cases. ⁷⁵

The rules of contribution as generally applied between a manufacturer subject to strict liability and a user who intentionally, recklessly or negligently harms an innocent third-party, offer the manufacturer an avenue by which it can seek to lessen or shift its burden of liability. ⁷⁶

Strict tort, however, does require that plaintiffs establish that the product in question was defective, an element of the tort that proves

71. RESTATEMENT (SECOND) OF TORTS § 402A (2)(a) (1977).

72. See, e.g., *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 447 (Cal. 1978); see also *Vargo*, *supra* note 2, at 547-48.

73. See RESTATEMENT (SECOND) OF TORTS § 402A, cmt. n (1977) ("the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section. . . .").

74. See, e.g., *Daly v. General Motors Corp.*, 575 P.2d 1162, 1177 (Cal. 1978); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 423 (Tex. 1984). *Contra*, *Bowling v. Heil Co.*, 511 N.E.2d 373, 375 (Ohio 1987). See generally SCHWARTZ, *supra* note 29, at 231-55. The proposed *Restatement of Products Liability* would apportion damages where plaintiff failed to conform to an applicable standard of care. See RESTATEMENT OF TORTS: PRODUCTS LIABILITY § 12 (Proposed Final Draft (Preliminary Version) 1996).

75. However, plaintiffs gain by being able to seek a partial recovery in cases where they have unreasonably assumed risks.

76. See, e.g., *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437 (Ill. 1977); *Wolfe v. Ford Motor Co.*, 434 N.E.2d 1008 (Mass. 1982). The possibility that the culpable user might be judgment-proof would hurt the manufacturer's chances to pass-off a portion of the liability. See *supra* note 58 and accompanying text.

problematical since in per se liability cases the products contain no flaws and are unavoidably unsafe.⁷⁷

C. *Strict Activity Liability*

The rule of strict liability for abnormally dangerous activities, as set out in the *Restatement (Second) of Torts*, requires courts to consider six factors in determining whether to impose liability without fault: (a) the seriousness of the harm threatened; (b) the degree of risk involved; (c) the possibility of reducing the risk by exercising due care; (d) the appropriateness of the activity to the surroundings in which it is carried on; (e) the extent to which the activity is commonly engaged in; and (f) the value of the activity to the particular community where it is located.⁷⁸ The absence of any indication of how much weight these factors should carry, however, lends a high degree of indeterminacy to this area of tort law.⁷⁹

If the decision to engage in extremely hazardous conduct is unreasonable, in that the activity's foreseeable risks outweigh its social utility to such a degree that a prudent person would not go ahead with it, persons injured by the activity may be able to recover in negligence.⁸⁰ Thus, the rule of strict liability is meant to apply only in cases where the initial decision to undertake the activity was reasonable.⁸¹ But the factors governing the imposition of strict liability seem quite close to those used to determine whether an actor's conduct is negligent.⁸²

77. For a discussion of this impediment to strict-tort product-category liability, see *infra* notes 154-61 and accompanying text.

78. See RESTATEMENT (SECOND) OF TORTS § 520 (1977).

79. For criticism of these factors as determinants of liability, see William K. Jones, *Strict Liability for Hazardous Enterprise*, 92 COLUM. L. REV. 1705, 1707 (1992) (advocating rule of strict liability for harm caused by hazardous activity where injured party has no significant control of incidence or extent of harm).

80. "If the utility of the activity does not justify the risk it creates, it may be negligence merely to carry it on, and the rule stated in this Section is not then necessary to subject the defendant to liability for harm resulting from it." RESTATEMENT (SECOND) OF TORTS § 520 cmt. b (1977).

81. The rule [of strict liability] . . . is applicable to an activity that is carried on with all reasonable care, and that is of such utility that the risk which is involved in it cannot be regarded as so great or so unreasonable as to make it negligence merely to carry on the activity at all. *Id.*

82. See KEETON ET AL., *supra* note 2, § 78, at 555 (strict liability and negligence factors are virtually the same, "except for the fact that it is the function of the court to apply the abnormally dangerous concept to the facts as found by the jury."). See also Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 970 (1981) stating:

The *Second Restatement*, however, seeks to deprive this liability rule of much of its strictness by insisting that the appropriateness of the activity's location and 'the value of the activity to the community'—considerations seemingly bearing on the activity's reasonableness or negligence—weigh heavily in the rule's application.

In those situations where the decision to launch the activity and the conduct of the activity are reasonable but the activity might still qualify as abnormally dangerous, this rule of strict liability seeks to motivate those responsible for the activity to exercise both an appropriate degree of care and an appropriate level of activity, and to force them to bear the costs of accidents that nonetheless occur. In addition, the rule is consistent with a view of corrective justice which postulates that when a defendant generates risks to plaintiff of an order different from the risks plaintiff imposes on herself, defendant should be strictly liable in tort to plaintiff for harm attributable to those risks.⁸³

In order to apply this theory to the manufacturers of unavoidably and unreasonably risky products, plaintiffs have to convince the courts that the production of these commodities amounted to an abnormally dangerous activity because it made possible subsequent highly risky activity by users of the product. Harm from goods such as cigarettes and handguns results directly from their consumption or use, and only indirectly from their manufacture.

D. Absolute Liability

A fourth approach that has been suggested for product-category cases—absolute liability—falls within the theory of enterprise liability.⁸⁴ It rests upon the conviction that businesses should bear all the costs they generate, because they are in a superior position to reduce their costs to the most economically efficient level, and spread, through insurance and other mechanisms, those costs that are not worth avoiding.⁸⁵

This theory would not restrict liability to costs incurred as a result of harm caused by abnormally dangerous activities or unreasonably and unavoidably dangerous aspects of products, but instead would force enterprises to internalize the costs of all damage they cause.⁸⁶ The cost spreading enterprise liability seeks to accomplish is consis-

83. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972).

84. On enterprise liability generally, see VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* (1995).

85. See Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 175-94 (1976) (discussing the goals, criteria, and basic rationale of enterprise liability theory).

86. For an elegant exposition of the case for enterprise liability in the products context, see Croley & Hanson, *supra* note 22.

tent with one of the justifications for strict-tort liability for defective products,⁸⁷ and may also lie behind the rule of strict liability for abnormally dangerous activities.⁸⁸

II. THE POLICY DEBATE

Three main policy arguments cut against the recognition of product-category liability at common law: first, judicial decisions to impose such liability would lack political legitimacy; second, the judicial system lacks the institutional competence to decide whether a type of product was so unreasonably and unavoidably dangerous that it never should have been marketed; and third, holding individual manufacturers liable on a case-by-case basis is an unfair way to reduce the flow of unavoidably and unduly risky products. In addition, a separate policy argument stressing the radical and unworkable nature of absolute liability has been put forward against the use of that theory.

This section will assess the strength of these arguments, and consider whether negligence theory offers any advantages to plaintiffs seeking to recover for harm caused by unavoidably dangerous products.

A. *The Legitimacy of Product-Category Liability*

The illegitimacy of per se liability at common law stems from the contention that the banning of a product is essentially a political act, and only legislative action can achieve the sort of public consensus that should be reached before society takes an initiative of this nature.⁸⁹ Judgments about whether the choice to market a type of product was reasonable require a weighing of societal risks and benefits, a responsibility that should be the exclusive province of the legislative branch. Moreover, the effect of per se liability infringes upon the autonomy of large segments of the consuming public, and if such restrictions are deemed necessary, political institutions should impose them.

87. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 933-34 (1981).

88. See Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 275-86 (1987).

89. See Grossman, *supra* note 6, at 405-07.

1. The Need for Public Consensus

Legislatures may prohibit the sale of inherently dangerous products and provide sanctions for violations of a ban.⁹⁰ Alternatively, a legislature might delegate to an administrative agency the authority to license potentially risky products before they are marketed,⁹¹ or to ban products already on the market and found to be dangerous.⁹² If lawmakers disagree with action taken by a regulatory agency, they have the authority to pass legislation nullifying or modifying what the agency has done.⁹³

A lawsuit imposing product-category liability on an individual manufacturer would not, in and of itself, force a particular product off the market. Indeed, the jury's verdict would not bind juries in subsequent product-category lawsuits involving the same product, even in the same jurisdiction.⁹⁴ For product-category liability at common law to amount to a product ban, a manufacturer would have to become convinced that different juries in different cases would conclude, with reasonable consistency, that products falling within a particular category were unduly hazardous. Prudent manufacturers would then voluntarily cease producing the item and possibly take steps to recall it from the market (or even from consumers) to minimize potential liability.

A series of verdicts for plaintiffs injured by one type of dangerous product might qualify as a public consensus that reflects the judgment

90. See, e.g., Controlled Substances Act, 21 U.S.C. §§ 801-904 (1994) (banning the manufacture or distribution of drugs or other substances that have a high potential for abuse and no accepted, safe-medical use).

91. See *supra* note 17.

92. See, e.g., 21 U.S.C. §§ 331(d), 333(a)(1), 334(a)(1), 335b(e) (1994) (providing for criminal sanction under the Food, Drug, and Cosmetic Act, for shipping in interstate commerce drugs banned and subject to seizure because they pose imminent hazards to their users.).

Courts might invoke a legislative or administrative ban to justify a finding of liability against anyone who violated the ban and thereby caused harm to plaintiff. Under the doctrine of negligence per se, the unexcused violation of a criminal statute or administrative regulation, in and of itself, amounts to negligent conduct. See CLARENCE MORRIS & C. ROBERT MORRIS, JR., MORRIS ON TORTS 61-79 (1980); see also Ballway, *supra* note 43.

For an example of a statute creating a civil remedy for plaintiffs injured by violations of rules that might include product bans, see Consumer Product Safety Act, 15 U.S.C. §§ 2072(a), 2061(a) (1994).

93. See, e.g., Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977) (codified at 21 U.S.C. § 343(o)(1) (1994)) (preventing the FDA from finalizing regulations banning sale of saccharin as a food additive and providing warning label for products containing saccharin). On the saccharin episode generally, see Richard A. Merrill & Michael R. Taylor, *Saccharin: A Case Study of Government Regulation of Environmental Carcinogens*, 5 VA. J. NAT. RES. L. 1 (1985).

94. Criticism directed at the episodic aspect of product-category will be discussed *infra* at Part II.C.

of the various juries' general communities. Moreover, if lawmakers determine that these verdicts are departing from the societal consensus, they are free to enact legislation prohibiting the imposition of liability. In fact, this has already occurred in several instances.⁹⁵ Opponents of product-category liability claim this supports their position.⁹⁶ It is just as logical, if not more so, however, to view these developments as proof of the rational functioning of a system that allows the judicial process to play a role judging marketing decisions, subject to legislative nullification.⁹⁷

Legislatures are apt to inject themselves into controversies over widely used, highly dangerous products such as handguns and cigarettes. On the other hand, in the case of less widely used products or products posing unreasonable but less extensive risks, legislative or regulatory attention cannot be assured. In these cases, lawmakers' and agency officials' decisions to act are discretionary in nature, and legislatures or agencies may simply decide that they have other, more important matters meriting their attention. Damage suits by victims thus serve as an alternative method of reviewing decisions to place these products on the market.

Additionally, the public consensus reached by a legislature may in fact reflect the wishes of interest groups able to force their will upon lawmakers.⁹⁸ Leaving room for product-category liability at

95. See, e.g., LA. REV. STAT. ANN. § 9:2800.56(1) (West 1991), *overruling* Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986); N.J.S.A. 2A:58C-3(a) (1996), *overruling* O'Brien v. Muskin Corp., 463 A.2d 298 (N.J. 1983).

Legislatures might also issue "preemptive strikes" and ban certain types of product-category suits to prevent plaintiffs from bringing them. See, e.g., CAL. CIV. CODE § 1714.4(a) (West 1983-1984) (barring product-category recoveries based on findings that risks from guns or ammunition outweigh their benefits).

On the other hand, legislatures might create statutory causes of action for product-category liability. For an example of a bill that would have created a federal remedy for victims in strict liability against manufacturers, importers and dealers of handguns and assault weapons, see H.R. 661, 103d Cong., (1993) ("Gun Violence Economic Equity Act"). For a discussion of an Illinois statute imposing liability upon any drug trafficker in the jurisdiction for any damage caused by drug users, see *Recent Legislation*, 109 HARV. L. REV. 699, 699-750 (1996).

96. See Grossman, *supra* note 6, at 395-97; Henderson & Twerski, *supra* note 6, at 1314-15.

97. I have argued elsewhere that the decision in *Kelley v. R. G. Indus.*, 497 A.2d 1143 (Md. 1985), imposing product-category liability upon the manufacturers of handguns, provoked a legislative reaction that on balance may have advanced the cause of public safety. See Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 688 n.198 (1990) (book review) (legislature "traded off" rule in *Kelley* as part of compromise to obtain a gun-control law).

98. Potential third-party victims of dangerous products would have no way to identify themselves, and thus could not organize themselves and make their views known to legislators or administrators. For a discussion of the political influence likely to be influenced by potential victims, see Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990). Users or consumers injured by risks of which they were unaware might, however, take part in legislative or administrative proceedings to ban the future sale of the product or to recall the product from the market.

common law permits ordinary people serving on juries to participate in the shaping of a societal judgment on the reasonableness of marketing inherently risky products.⁹⁹ The quality of their participation depends on the quality of the information presented to them by the attorneys trying the cases. It is arguable that the data committed advocates marshal on behalf of product-category liability in a tort suit may well be more effective than that mustered on behalf of product bans or removals in the legislative arena.

Since jurors would be weighing the same factors in negligence as in strict tort for unreasonably dangerous products, and the decision-making process would be the same under both, neither theory would have an advantage over the other in rebutting the public-consensus argument.

2. The Generality of Risk-Benefit Assessments in Product-Category Liability

If courts were to recognize product-category liability either under negligence or strict liability theory, then juries would need to assess the overall risks a type of product created, and then compare those risks with what society would have lost if the items had never been marketed.¹⁰⁰ The factors to be weighed by jurors would be quite general in nature, especially when viewed against the very particularized risks and avoidance costs juries are asked to consider in ordinary negligence cases.¹⁰¹ Even in suits where plaintiffs claim that a defendant was unreasonable in deciding to engage in an activity,¹⁰² the activity in question usually is nonduplicative since it occurs within contexts that can vary considerably from case to case. Thus what might be unreasonably dangerous in one environment might be reasonably safe in another.¹⁰³ This keeps the extent of the danger created, and perhaps the amount of utility as well, within bounds easily comprehended by

99. On the other hand, allowing consumers to decide whether or not to buy inherently risky products also permits public participation since goods that no one buys will not be marketed. This argument would not apply, however, to products whose dangers (or the full extent of whose dangers) were not known to buyers of products that put innocent third persons at risk.

100. See *supra* notes 39-42 and accompanying text (negligence); see also *supra* notes 64-67 and accompanying text (strict liability).

101. Normally juries are asked to determine whether an individual act or omission for which defendant was responsible was reasonable or unreasonable. The risks created usually endanger a limited number of people, and the cost of avoidance usually focuses on the cost defendant would have incurred either by doing a single alternative act, or not doing the individual act that plaintiff claims was unreasonably dangerous.

102. See *supra* notes 31-36 and accompanying text.

103. The decision to use dynamite, for example, might be reasonable or unreasonable, depending upon the location where the activity is to occur.

jurors.¹⁰⁴ On the other hand, product categories are duplicative, in the sense that other manufacturers can market goods that fall within the same category and create the exact same risks and benefits. This complicates the jury's risk-utility balancing.

Does this mean that only legislators, or administrators, may legitimately make the judgment that a marketing decision produced unreasonably dangerous results?

To the contrary, judges at common law have the power to create duties binding the community at-large or broad classes of people within society.¹⁰⁵ When they exercise this function, they may take into account any societal benefits and risks that flow from recognizing, or refusing to recognize, the obligation at issue.¹⁰⁶ If courts decide to impose a duty, their authority to do so is beyond question.¹⁰⁷

Additionally, when a jury, acting pursuant to a court's recognition of a duty of due care in the making of marketing decisions, finds that a manufacturer acted unreasonably in distributing a particular type of product to consumers, or finds a manufacturer strictly liable in tort because a product category's risks outweighed its benefits, there seems to be no compelling reason to doubt the legitimacy of the verdict as it affects the individual defendant.¹⁰⁸ The same would be true if a number of different juries reached the same conclusion, and manufacturers discontinued producing the particular items.

Finally, the imposition of design liability traditionally has required the jury to weigh the risks arising from a particular design against the costs of using an alternative design—including any loss of utility that might result from the incorporation of the latter.¹⁰⁹ Given

104. The jury would be assessing both the utility and the risks generated by a single activity.

105. For example, courts have imposed a duty of reasonable care on social hosts not to serve alcoholic beverages to minors or visibly intoxicated adults. See PAGE, *supra* note 28, § 12.21.

106. For a recent example of judicial consideration of policy factors in deciding whether to impose liability on social hosts for negligently serving alcoholic beverages to minors, see *Charles v. Seigfried*, 61 N.E.2d 154, 156, 160 (Ill. 1995) (no duty).

107. According to Professor Melvin Aron Eisenberg, courts derive their legitimacy in formulating legal rules from their impartiality and the universality of the rules they establish. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 8-9 (1988).

108. The jury would be expressing the community's judgment about whether the risks generated by a product category outweighed its utility. See *Moning v. Alfono*, 254 N.W.2d 759, 763 (Mich. 1977).

As Professor Eisenberg has noted, the "general community . . . communicates with the courts in very direct fashion through the jury: one function the modern jury serves is to give the courts a reading on what social propositions are accepted by the community at large." EISENBERG, *supra* note 107, at 13.

Whether the judicial process is competent to make such determinations is a separate issue, to be discussed *infra* at Part II.B.

109. See *supra* notes 39-42 and accompanying text (negligence), and *supra* notes 64-67 and accompanying text (strict liability).

the fact that design features are duplicative in nature, since every item falling within a particular product line incorporates them (and other manufacturers may replicate them), the factors juries balance in these cases contain a high degree of general applicability.¹¹⁰ Decisions reached by these juries would likewise seem legitimate.

3. Infringing Upon Autonomy

Another objection to product-category liability is that it would unacceptably curtail the rights of consumers¹¹¹ to satisfy their product preferences.¹¹² Recognizing this form of liability, according to critics, would impose such staggering actual and potential costs upon manufacturers that they would have to remove the targeted products from the marketplace.¹¹³ The implication here is if restrictions are to be placed on the cornucopia of goods from which a consumer might exercise his freedom to choose, then they should be imposed by the public's elected representatives, or by administrators acting under the authority delegated to them by the legislature.

The personal autonomy said to be at stake here is a bedrock value that the common law traditionally has sought to preserve and promote.¹¹⁴ The freedom to make choices about how to exercise one's purchasing power serves as an important component of human dignity,¹¹⁵ as well as an essential contributor to the proper functioning of a market economy.

For these choices to be worth protecting, however, they have to be informed. This means that if consumers are incapable of understanding the existence and extent of unavoidable risks associated with a product, or are otherwise unaware of them, a cause of action for

110. This is especially true when plaintiff claims that a product was negligently or defectively designed because it lacked a particular safety device.

111. In this section the term "consumer" is used to connote a person who uses or consumes a product, whether she purchased the product or not. The freedom implicated here involves both the right to buy and the right to use or consume.

112. See Grossman, *supra* note 6, at 405.

113. See Henderson & Twerski, *supra* note 6, at 1314.

114. "With its elements of knowledge, appreciation, and choice, the classical assumption of risk defense is an expression of judicial belief in the values of individual freedom that were prevalent in the early common law." Note, *Assumption of Risk and Strict Products Liability*, 95 HARV. L. REV. 872, 888 (1982) (citation omitted).

The most notable example of the protection the common law extends to personal autonomy is its refusal to recognize a duty of reasonable care to aid a stranger in peril. See Heyman, *supra* note 28, at 676.

115. The freedom to make choices extends beyond purchasers to individuals who have the opportunity to use or consume a product. Their freedom merits the same protection and promotion. Hence, like treatment should be afforded both purchaser and nonpurchaser users or consumers.

product-category liability would not infringe upon their personal freedom.¹¹⁶

When consumers who are as cognizant of a product's inherent dangers as the manufacturer decide to buy it, they presumably engage in the same sort of balancing process that the manufacturer performed when deciding to market it. To the contrary, however, consumers balance on a personalized level, taking into account the risk and utility they expect from the product (rather than the societal utility and risk the manufacturer should calculate and compare). In situations where a reasonable manufacturer would not have marketed a product because its risks outweighed its utility, one of two conclusions may flow from a decision by consumers to consume: either the decision is unreasonable, just as the manufacturer's behavior in choosing to market the product category was unreasonable, or the benefits to the individual consumer outweigh the risks to her, so her option to consume is reasonable.

Where consumers have deliberately expressed a positive preference for known risks inherent in a product and suffer harm as a result, they have in a sense received what they asked for, since presumably the price they were willing to pay for the product included the value they assigned to the risk.¹¹⁷ It is difficult to understand why it would be fair to permit these consumers to recover damages.¹¹⁸

Personal freedom to make risky consumption decisions and personal responsibility for the harm these decisions cause would seem to constitute two sides of the same coin. Product-category liability might, indeed, infringe upon personal autonomy if it permitted the injured party to recover under these circumstances. But an innocent third-party victim would stand in a different position, closer to that of the unwary consumer. The victim's freedom to enjoy physical security would have been infringed upon, without any corresponding personal gain inuring to the victim from the consumption of the dangerous product.

The autonomy argument would therefore cut against product-category liability only when a consumer, fully aware of the existence and severity of a product's inherent dangers, decided to expose herself to

116. Indeed, it plausibly could be argued that the sale of a dangerous product interferes with the autonomy of unwary users or consumers by subjecting them to unreasonable risks of harm.

117. See Note, *Assumption of Risk and Strict Liability*, *supra* note 114, at 875-82.

118. For a detailed justification for denying plaintiffs recovery for harm caused by risks for which they have expressed a preference, see Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987).

them. Imposing liability would act as a disincentive for manufacturers to permit the consumer to make this choice to the extent that it deters them from marketing unreasonably and inherently dangerous products.

To what extent does the current state of the law either enhance or diminish individual freedom in the context of product-category liability? Under existing negligence doctrine, if the consumer made a reasonable choice to confront a product's unavoidable risks, she would not be able to recover for her damages if the jurisdiction recognized the defense of assumption of risk.¹¹⁹ In jurisdictions where assumption of risk has been abolished, courts might conceivably rule that manufacturers have no duty to refrain from marketing inherently and unduly risky products for the benefit of plaintiffs who make reasonable choices to use or consume them.¹²⁰ Focus upon the duty element would permit courts to consider the enhancement of personal autonomy as a policy factor supporting a refusal to recognize a duty.¹²¹

If the consumer made an unreasonable choice, she might be able to obtain a partial recovery in jurisdictions that recognized comparative fault,¹²² but would be barred from recovery in jurisdictions where the rule of contributory negligence still applied.¹²³ Under strict tort doctrine, the reasonable plaintiff could recover in full,¹²⁴ while the unreasonable plaintiff would be barred from recovery¹²⁵—except in jurisdictions that recognized comparative fault as a partial defense.¹²⁶

119. See *supra* note 56 and accompanying text; see also KEETON ET AL., *supra* note 2, § 68, at 481.

120. See Aaron D. Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 IOWA L. REV. 1, 27 (1974) (whether plaintiff aware of a product's risk and willing to encounter it should be permitted to recover is a "pure duty question").

On the treatment of plaintiff's reasonable assumption of risk as a function of defendant's duty or lack thereof, see generally Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

121. Courts would have to weigh the value of personal autonomy against competing values, such as efficiency. The case for duty recognition as a means of enhancing efficiency would posit that the law should deter manufacturers from selling inherently and unreasonably dangerous products even to consumers aware of the risks. Because their risks outweigh their utility, society would on balance be better off if these products were not available to consumers.

It is also conceivable that juries in product-category cases would consciously or unconsciously factor into the risk-utility equation the social benefit of permitting individual consumers the right to make free and informed purchases of dangerous products.

122. See *supra* note 55 and accompanying text; on comparative negligence generally, see SCHWARTZ, *supra* note 29.

123. See *supra* note 54 and accompanying text.

124. See *supra* note 72 and accompanying text.

125. See 2 MADDEN, *supra* note 54, § 13.8, at 14.

126. See *supra* note 74 and accompanying text.

Thus, where the consumer acts reasonably, negligence doctrine will promote autonomy more than strict tort liability. Under the latter, the injured consumer will always be able to recover in full,¹²⁷ whereas under negligence doctrine, recovery may be denied.¹²⁸

Where consumers act unreasonably, negligence and strict tort liability would achieve identical results—denying liability in full or permitting a partial recovery under comparative fault.¹²⁹ Conceivably a court in a comparative negligence jurisdiction might hold that, as a matter of law, manufacturers have no duty to exercise due care in marketing decisions for the benefit of consumers who make unreasonable purchasing decisions in order to avoid the anomalous result of refusing to compensate plaintiffs where they have acted reasonably, but granting some recovery to plaintiffs who have acted unreasonably.¹³⁰

B. Institutional Competence

A second policy argument stresses the incapacity of courts to engage in the balancing of risks and utility necessary to support a finding of product-category liability.¹³¹ This view posits that only legislatures, or administrative agencies acting under authority delegated to them by lawmakers, have the tools necessary to decide whether to ban a product. Referring to one particular type of product category, Professors Henderson and Twerski have written that, “[t]o be answered rationally, the question whether handguns of a particular size and monetary price are ‘good for society’ would require extended legislative or administrative hearings and investigations.”¹³² An additional advantage possessed by regulatory agencies is the expertise they possess and can bring to bear upon the judgments they render.

127. See *supra* note 73 and accompanying text.

128. See *supra* notes 117-19 and accompanying text.

129. See *supra* notes 119-23 and accompanying text.

130. The New Jersey Supreme Court has recognized an exception to the defense of contributory negligence where a defendant was found to have breached a duty to protect a class of persons from their own inadvertence. See *Bexiga v. Havir Mfg. Co.*, 290 A.2d 281 (N.J. 1972). Although such inadvertence might have amounted to negligence on plaintiff's part, the Court held that he could recover under either negligence or strict tort liability. See *id.*; see also *Suter v. San Angelo Foundry & Mach. Co.*, 406 A. 2d 140 (N.J. 1979) (*Bexiga* rule applied after adoption of comparative negligence in New Jersey). A similar argument based on policy and logic might support the denial of recovery by consumers who have unreasonably opted to expose themselves to known product risks.

131. See Grossman, *supra* note 6, at 407-10.

132. Henderson & Twerski, *supra* note 6, at 1306. For a reiteration of the institutional-incompetence argument, see Toke, *supra* note 12, at 1202-05, 1208-10.

First of all, it is necessary to clarify what the institutional-competence argument does not say. The debate here should not be about whether legislatures and administrative agencies are more capable of making product-banning decisions than the courts, but rather whether courts are so incompetent to do this that the judicial process should totally exclude itself from any role in the reviewing of decisions to place products on the market. The fact that the legislative and administrative processes may be superior to the courts in their capacity to marshal facts and weigh competing considerations, a point which some have disputed,¹³³ does not mean that the capacity of the courts to do likewise is so weak that as a matter of general principle they should abstain from adjudicating product-category tort claims.

The institutional-competence argument assumes that decisions made by legislators and regulatory officials always will emerge from a dispassionate weighing of utility and risk. Yet legislatures are not required to engage in any sort of balancing before they decide to ban (or not to ban) a product, but are free to act on the basis of purely political considerations.¹³⁴ Administrative agencies, moreover, may be vulnerable to pressures from the executive or legislative branches, and responsive to the wishes of interest groups with an extensive financial stake in the outcome of a regulatory proceeding.¹³⁵

The institutional-competence argument is in fact a revival of the criticism directed in the past at the balancing of risk and utility in product design cases, where jurors are asked to decide whether a manufacturer should have used an alternative design in order to eliminate or reduce an unreasonable risk of harm posed by a product.¹³⁶ Under both negligence and the risk-utility test for strict liability in design cases, fact-finders must weigh the foreseeable risks associated with a

133. See Bogus, *supra* note 7, at 65-85; see also Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).

134. Under public-choice theory, which views the political process through the lens of economic analysis, legislative decision-making can lead to arbitrary and discriminatory results, often yields outcomes that favor private interest groups, and bestows economic gain beyond that which the free market would produce. See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 283-95 (1988); see also Jonathon R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227-33 (1986).

Thus, public-choice theory might be applied by courts in support of product-category liability, and against the view that risk-utility balancing with respect to decisions to market products should be the exclusive province of the legislature (or administrative agencies).

135. See Bogus, *supra* note 7, at 76-85; see also Komesar, *supra* note 98.

136. For the earliest and most extensive elaboration of the argument, see James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); see also RICHARD EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 84-88 (1980).

product as designed against the cost of avoiding those risks, the latter measured by the economic burden the manufacturer would have had to bear if an alternative design had been used, as well as any loss of utility the alternative design might impose upon the public.¹³⁷ Critics have pointed to the difficulty, if not impossibility, in the context of litigation focusing on a particular aspect of a product's design, of taking into account the ripple effects an alternative design might generate.¹³⁸

Whatever the merits of this argument as it relates to design cases,¹³⁹ it generally does not apply to product-category liability, where jurors would not have to consider the technological and economic feasibility of an alternative design, but rather the cost to society of being deprived of a particular product. This is not an issue that usually requires any degree of scientific expertise. A lay jury is perfectly capable of rendering a common-sense judgment on the social utility of products such as handguns, armor-piercing bullets, cigarettes, and exploding cigars.¹⁴⁰

As previously noted, manufacturers in negligence-based product-category cases might assert the judicial-incompetence argument if they sought to persuade a court not to burden them with a duty, as a matter of law, to use reasonable care in the decision whether to market a product.¹⁴¹ The judicial system's supposed incapacity to render such a judgment would constitute a policy reason for holding that the manufacturer's obligation to use due care applies only to the design, construction, and labeling of products, and not to marketing decisions.

At the same time, courts deciding whether to limit a manufacturer's duty could consider appropriate policy reasons for imposing a legal obligation in product-category cases.¹⁴² These reasons would in-

137. On the risk-utility test for strict liability in design-defect cases, see John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973); see also Birnbaum, *supra* note 2, at 649 (on the similarity of the risk-utility test to the test for negligent design).

138. The difficulties created by the ripple effect, also known as polycentricity, provided the basis for the argument against design liability set out in Henderson, *supra* note 136.

139. For a criticism of the validity of this criticism of design liability, see Ralph Nader et al., *Automobile-Design Liability and Compliance with Federal Standards*, 64 GEO. WASH. L. REV. 415, 431-34 (1996).

140. For a case holding that jurors were capable of assessing the utility and risks of marketing slingshots to children, see *Moning v. Alfono*, 254 N.W.2d 759 (Mich. 1977).

On the ability of lay juries to assess both the costs and the benefits of alcoholic beverages, see Cochran, *supra* note 19, at 316.

141. See *supra* note 49 and accompanying text.

142. For a discussion of the various policy factors that courts should weigh in deciding whether to impose a duty as a matter of law, see KEETON ET AL., *supra* note 2, § 53, at 359.

clude the desirability of creating incentives to force manufacturers to exercise due care when they decide whether to market a product,¹⁴³ and the moral blame that the community might attach to marketing decisions that unleashed low-utility, high-risk products on the public.¹⁴⁴

In the strict liability context, the institutional-competence argument would have to serve as a reason for limiting strict liability to cases involving flawed products, or products rendered unreasonably dangerous because of the defendant's failure to adopt an economically and technologically feasible alternative design, the position taken in the new *Restatement of Products Liability*.¹⁴⁵ The use of negligence theory in product-category cases may have a slight advantage for plaintiffs, because the existence of culpability on the part of manufacturers serves to offset the judicial-incompetence factor to the extent that a court might be willing to give it weight.

C. *Even Handedness in Product Banning*

Case-by-case adjudication of product-category cases means that plaintiffs will target individual manufacturers. Even though a number of companies may sell goods falling within a particular category, potential liability will extend in a serendipitous way to the producer or producers who happen to be sued. Moreover, jury verdicts imposing or refusing to impose product-category liability may vary from jurisdiction to jurisdiction, and even within the same jurisdiction. Indeed, there is no guarantee that the same verdict will be reached in successive cases involving the same product made by the same manufacturer.

A legislative or administrative ban, on the other hand, extends across the board to all manufacturers whose goods fall within a specified category, and will apply evenly to all affected products. Thus, the marketer of a product that has not yet injured anyone will receive the same treatment as the manufacturer whose products have inflicted harm.

143. *See id.* The benefits and burdens that might accrue to society may bear upon the recognition of a duty. Thus, a court should consider how much social gain, in terms of accident and injury prevention, the imposition of a legal obligation might bring about, and balance this against the social costs of imposing the obligation. If a net gain would result, the recognition of the duty would help prevent future harm that is worth preventing, which is one of the policies courts have sought to promote under the rubric of the duty issue. *See id.*

144. *See supra* note 45 and accompanying text.

145. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (Proposed Final Draft (Preliminary Version) 1996).

It is difficult to imagine why product-category suits might be unfair because they single out manufacturers whose unavoidably dangerous products have caused injuries. First of all, in disposing of those claims, the courts will not be applying a novel principle of law. The notion of reasonableness has long implicated a balance of utility against risk.¹⁴⁶ Hence, no element of surprise is present. In addition, an innocent victim has suffered harm because a manufacturer has acted unreasonably in placing a product in the stream of commerce, and the blameworthiness that attaches to such conduct would make it unfair to deny recovery to the plaintiff.

Different juries may indeed come out with different verdicts when they assess a manufacturer's marketing decision, but this could reflect different values that individual communities place upon the utility of particular products. Rural jurors, for example, may view the sale of handguns more (or less) benignly than urban jurors. Thus, product-category tort suits may more accurately evoke relevant social attitudes toward unavoidably risky products than legislators or administrators.

D. Absolute Liability As Unworkable And Radical

Absolute liability means that a defendant is responsible for the consequences of her acts. This theory, when applied to manufacturers, would permit plaintiffs to recover for any harm caused by a product, whether defective or not, and whether unreasonably dangerous or not.¹⁴⁷

Absolute liability would raise difficult issues of causation and loss allocation. Suppliers of raw materials, designers, component-parts manufacturers, assemblers, those involved in the marketing process, distributors, transporters, retailers, installers, consumers, and users might all have done something to contribute to an injury inflicted by a product. It would be difficult to determine in a principled way at what point, if any, to exclude from responsibility parties who contributed to

146. See, e.g., RESTATEMENT (SECOND) OF TORTS § 291(1) (1977) (acts deemed unreasonable, and hence negligent, if risks outweigh utility).

147. Professor Gary Schwartz refers to this as "genuine strict liability." See Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 441 (1979). Professor Owen calls it "'ultra-strict' liability." See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 714 (1980). Professors Croley and Hanson distinguish the terms "absolute liability" and "enterprise liability" by postulating that under the latter manufacturers cannot contractually relieve themselves of liability. See Croley & Hanson, *supra* note 22, at 693-94.

the chain of events culminating in a product-related accident or illness.¹⁴⁸

Another serious problem with absolute liability is that its adoption would constitute a radical expansion of tort liability.¹⁴⁹ Not only would the rule considerably broaden the ambit of harms for which manufacturers might be liable, but it might logically extend beyond products to damage caused by activities and conditions. Courts considering whether to impose this form of liability in a particular product-category case would have to keep in mind that they would either be opening the way to the application of absolute liability to defendants who engage in activities or maintain artificial conditions,¹⁵⁰ or they would have to justify limiting the doctrine to manufacturers and sellers of products.¹⁵¹

Realistically, there is no possibility of securing judicial adoption of a rule of absolute liability in the near future. Although in theory courts have the authority to formulate such a rule, it does not yet command the degree of societal support to provide the undergirding for a

148. See Henderson & Twerski, *supra* note 6, at 1279-83. The authors also point out the difficulty in reconciling the notion of comparative fault with absolute liability, since the jury would have nothing with which to compare negligence on the part of the plaintiff. See *id.* at 1283-84. However, the development of a theory of comparative causation might surmount this problem. Finally, the authors argue that absolute liability would make it difficult, if not impossible, for courts to place any limits on the manufacturer's responsibility for durable goods meant to last for many years. See *id.* at 1285-86.

For criticism of the Henderson-Twerski critique of absolute liability, see Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157 (1992); for a rebuttal, see James A. Henderson & Aaron D. Twerski, *The Unworkability of Court-Made Enterprise Liability: A Reply to Geistfeld*, 67 N.Y.U. L. REV. 1174 (1992).

149. A recent book advocating the judicial adoption of enterprise liability recognizes that courts would not only have to fashion broad new rules to define the scope of the liability of business enterprises, but they would also have to utilize the common law to place limits on recoverable damages. See NOLAN & URSIN, *supra* note 84, at 168-177. The determination of appropriate monetary caps on damages would seem to be a task for legislatures rather than courts, since it would necessitate compromise as well as periodic adjustment.

Theoretical scholarship advocating absolute liability generally ignores the practical difficulties of fashioning and implementing such a rule within the real-world constraints of the judicial and legislative processes.

150. For arguments in favor of imposing strict tort liability on landlords, see Jean C. Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?* 1975 WIS. L. REV. 19. For arguments in favor of imposing strict tort liability on the possessors of business premises, see Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975).

151. Courts have not hesitated to subject the sellers and manufacturers of defective products to the expansive doctrine of strict tort liability, while at the same time they have refrained from extending the rule in other contexts. See, e.g., *Hammontree v. Jenner*, 97 Cal. Rptr. 739, 742 (Ct. App. 1971) (driver subjected to sudden epileptic seizure, which could be categorized as a species of defect, held not liable to plaintiff injured when struck by out-of-control vehicle); *Peterson v. Super. Ct. (Paribas)*, 899 P.2d 905, 906 (Cal. 1995) (holding neither residential landlords nor hotel proprietors strictly liable for harm caused by defect in leased premises).

completely new basis of tort liability.¹⁵² Indeed, the tendency of courts in recent years has been to cut back on the reach of tort liability, or at the very least to reject attempts to expand it.¹⁵³

Negligence liability, therefore, offers a more promising way to deal with the immediate need to deter the introduction of unduly, inherently dangerous products into the stream of commerce, since judges are comfortable with the doctrine and there is widespread public acceptance of the notion of blameworthiness as a basis for responsibility. The development of a theory of absolute liability is a long-range project that requires careful attention to how it would play out in the real world, and how to achieve the sort of societal consensus upon which judges might draw in fashioning a new liability rule.

III. THE DOCTRINAL DEBATE

Opponents and advocates of product-category liability have disagreed about whether the theory fits within the parameters of strict-tort products liability and strict tort liability for abnormally dangerous activities. The critics' position amounts to advocacy of a rule of no liability. This Section will explore the extent to which negligence doctrine might enable supporters of product-category liability to overcome some specific objections that have been raised against using strict liability to impose it, and to mount a counterattack on a rule that would deny recovery to plaintiffs injured by unavoidably and unreasonably dangerous products.

152. Common law courts created the rules of negligence, as well as of strict liability for abnormally dangerous activities and defective products. But their exercise of the law-making function is not unlimited. As Melvin Aron Eisenberg has pointed out, courts establish and change the common law in accordance with certain basic principles, which include the necessity of rooting new rules in general standards followed by society as a whole; these standards may include moral norms, policies and customary practices. See EISENBERG, *supra* note 107, at 9, 14-42.

153. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

Moreover, the current legislative climate has produced a wave of statutory limitations on both recovery and damages in tort law at the state level. For a compilation of state legislation, see American Tort Reform Association, *Tort Reform Record* (Dec. 31, 1996) (copy on file with the author).

Courts may look to legislation as an embodiment of policies that reflect societal standards and hence ought to influence the direction of common law development. See EISENBERG, *supra* note 107, at 29-30.

A. Strict Products Liability vs. Negligence

The field of strict-tort products liability, like ancient Gaul,¹⁵⁴ is divided into three parts: claims involving manufacturing flaws, design flaws, and inadequate warnings or instructions-for-use.¹⁵⁵ Products giving rise to per se liability claims do not contain any manufacturing flaws, are reasonably designed to achieve their intended purpose, and bear adequate warnings and instructions-for-use.¹⁵⁶ Hence, they do not fit within any of the traditional categories.

In and of itself, this should not necessarily protect the makers of unreasonably and unavoidably unsafe products from the threat of strict tort liability. The tripartite classification system has never been more than a factual construct. Elevating it to the status of a legal principle defining the exclusive reach of strict tort liability in products cases would represent a triumph of legerdemain over logic.¹⁵⁷

Opponents of product-category liability have sought to justify their position by asserting that the sine qua non of strict liability, as it has been applied in the three classes of products cases, is the existence of a defect in the product.¹⁵⁸ Defects have been defined as either departures from the manufacturer's own blueprint for the product;¹⁵⁹ or as the failure to use an alternative design, warning, or instruction-for-use that could have been employed at a reasonable cost and would have eliminated the unreasonable danger that caused the injury.¹⁶⁰

In product-category cases, the product is nondefective, since it contains no flaw, and since there is no alternative design, warning, or instruction-for-use that reasonably and feasibly could eliminate the

154. See CAESAR, *THE GALLIC WAR* 2 (T.E. Page et al. eds., Loeb Classical Library 1917) ("Gallia est omnis divisa in partes tres") ("All Gaul is divided into three parts") (author's trans.).

155. On the tripartite categorization of products-liability cases, see KEETON ET AL., *supra* note 2, § 99, at 695-702.

156. If they are obviously dangerous or they bear warnings about the hidden dangers they pose, they would be unreasonably dangerous upon a finding that their risks outweighed their utility. If the manufacturer gave no warning about a danger of which he was or should have been aware, and a reasonable manufacturer would not have marketed the product even to consumers who had been fully warned, product-category liability might also be imposed.

157. If this were to occur, it would not be the first time in tort law history that factual categories transformed themselves into exclusionist rules. For a critical account of the process by which the factual classification of invasion-of-privacy cases hardened into legal doctrine, see G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 172-76 (1980).

158. See Grossman, *supra* note 6, at 387-92; Henderson & Twerski, *supra* note 6, at 1270-71; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (Proposed Final Draft (Preliminary Version) 1996).

159. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (Proposed Final Draft (Preliminary Version) 1996).

160. See *id.* § 2(b)-(c).

danger. Therefore, according to the product-category contras, the strict tort remedy should not be available to the victims of these unavoidably unsafe products.¹⁶¹ Under this ratiocination, the fact that the utility of the product pales before the magnitude of the risks created by it becomes totally irrelevant to the liability issue.

Supporters of strict-tort per se liability, on the other hand, insist that the sine qua non of strict tort ought to be unreasonable danger, rather than defectiveness.¹⁶² Hence, products creating hazards that outweigh the benefits they generate would flunk the risk-utility test and thereby earn the designation of unreasonably dangerous, subjecting the manufacturer to strict tort liability.

Reliance upon the absence of a defect to negate strict-tort product-category liability overlooks the fact that in design, warning, or instruction-for-use cases the existence of a defect is established solely upon proof that the product as marketed was unreasonably dangerous. There is no "flaw" in the product, other than the undue danger that results from the manufacturer's failure to employ an alternative design, warning, or instruction-for-use. If, by definition, a product can be deemed "defective" in its design or labeling upon proof by plaintiff that the product as designed or labeled was unreasonably dangerous, conceptually it would seem logical to classify a decision to market a whole category of products as "defective" because of the manufacturer's failure to make an alternative marketing decision that would have withheld the product from consumers. The manufacturer's option to market would be evaluated in the same way as her option to use one of several alternative designs, warnings, or instructions-for-use.¹⁶³

Utilizing negligence theory in product-category cases would bypass the dispute over whether the existence of a defect is a prerequisite to liability because the courts have never burdened plaintiffs with the need to prove that a product is flawed in order to establish negli-

161. See Note, *Handgruns and Products Liability*, *supra* note 4, at 1912-20.

162. See, e.g., Bogus, *supra* note 7, at 13-17; Wertheimer, *supra* note 12, at 1440-41.

163. On the other hand, reliance upon unreasonable danger as the linchpin of strict products liability overlooks the fact that, where manufacturing defects are alleged, the courts generally do not force plaintiffs to prove both the existence of such defects and the fact that these flaws rendered the product unreasonably dangerous. See KEETON ET AL., *supra* note 2, § 99, at 695 ("A flaw that is created in the construction or marketing processes makes the product unreasonably dangerous as a matter of law since it causes the product to be more dangerous than it was designed to be."). Instead, courts either conclusively presume, *sub silentio*, that the flaws created an undue risk, or they dispense altogether with the unreasonable-danger requirement.

gence on the part of a manufacturer.¹⁶⁴ Since the focus in these cases is upon the conduct of the defendant, the standard for liability is what a reasonably prudent producer would have done in designing, manufacturing, and labeling the item in question. In a product-category case, the issue would be what a reasonably prudent producer would have done in making a final decision whether to market the commodity.

The use of strict liability as the governing theory in product-category cases avoids the need to convince jurors that the marketing of a reasonably designed, manufactured, and labeled product was unreasonable. Even though the risk-utility factors to be weighed by the jury under strict liability and negligence might be virtually identical, would fact finders be much less likely to find that a marketing choice was negligent than to find that an inherently dangerous product was defective?¹⁶⁵

If semantics pose a problem here, it seems plausible that jurors would have at least as difficult a time concluding that an unflawed product was defective as they would in determining that a marketing choice was negligent, which would nullify any advantage strict liability offers in this regard. Moreover, if jurors in product-liability suits against tobacco companies were willing to hold individual smokers personally responsible for choosing to smoke because of the known risks associated with cigarettes,¹⁶⁶ it is not farfetched to suggest that they might be willing to hold manufacturers responsible for choosing to market an unreasonably risky product, especially where plaintiff is either an innocent third-party victim or an unwary consumer.

B. Strict Activity Liability vs. Negligence

Attempts by plaintiffs to convince courts to hold handgun manufacturers strictly liable for engaging in an abnormally dangerous activity by marketing a highly hazardous commodity have been rejected in unequivocal terms that apply formalistic reasoning to underscore the inappropriateness of the theory in the products liability context.¹⁶⁷

164. See Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 TENN. L. REV. 1105, 1112 (1994).

165. I extend my appreciation to Professor Carl T. Bogus for urging me to confront this question.

166. See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 871-76 (1992); Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 131, 145 (Robert L. Rabin & Stephen Sugarman eds., 1993).

167. See, e.g., *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (interpreting Illinois law; making sale of product an activity would blur distinction between strict

Where the hazardous activity in question involves the use of a product, the courts have been noticeably unreceptive to efforts to apply the theory to defendants other than those who actually utilized the product in an abnormally dangerous way.¹⁶⁸ This is not surprising since there has been a judicial reluctance to expand the parameters of the doctrine of strict-activity liability.¹⁶⁹

Nonetheless, the existence of the doctrine does raise the question why the user of nondefective explosives may be strictly liable in tort to strangers injured in a blast that could not have been avoided by the exercise of due care, but the manufacturer of those same explosives would escape liability unless, as this Article argues, the decision to market the explosives in the first instance was unreasonable. The issue may be sharpened by hypothesizing that the user, found to be strictly liable in tort, turns out to be judgment-proof. Why, then, should the manufacturer escape the reach of an identical rule of liability without fault?¹⁷⁰

Strict-activity liability, as conceived by the *Restatement*, would not automatically apply to a person using explosives, but would flow from a judicial finding that the activity in question is abnormally dangerous.¹⁷¹ This would require a close look at the circumstances of the particular blast. If the rule extended to the marketing, as well as the use of explosives, the factors utilized to determine abnormal danger would not necessarily lead to a finding of strict liability for the marketer since the risk involved in manufacturing and selling explosives might not be of the same magnitude as an individual user's decision to set off a particular blast in a particular location. Therefore, subjecting both users and manufacturers to the same rule would not necessarily produce identical results since it would require the balancing of disparate factors.

liability for sale of unreasonably dangerous products and strict liability for ultrahazardous activities); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1255-56 (5th Cir. 1985) (applying Louisiana law, liability for abnormally dangerous activity limited to activities that "originated in a landowner or custodian's use or abuse of land or immovable property in such a way as to cause injury to another person."); *contra*, *Chapman Chem. Co. v. Taylor*, 222 S.W.2d 820, 827 (Ark. 1949) (production of harmful pesticide held to be ultrahazardous activity).

168. See, e.g., *Cropper v. Rego Distrib. Ctr.*, 542 F. Supp. 1142, 1149 (D. Del. 1982) (manufacturer of anhydrous ammonia facility not strictly liable for engaging in abnormally dangerous activity because it did not operate facility); *Hatfield v. Atlas Enter.*, 262 S.E.2d 900, 901 (S.C. 1980) (manufacturer of fireworks not strictly liable for engaging in abnormally dangerous activity; it did not engage in discharging fireworks).

169. See Schwartz, *supra* note 82, at 976 ("the ultrahazardous rule has stagnated in the courts").

170. I am indebted to my colleague Avery Katz for pressing this question on me.

171. See *RESTATEMENT (SECOND) OF TORTS* §§ 519, 520 (1977).

In addition, as has already been suggested, the *Restatement's* rule of strict liability for abnormally dangerous activities involves the consideration of elements that bring it quite close to negligence doctrine.¹⁷² If the sale of a nondefective, unavoidably hazardous product creates a high degree of risk and has no special value to either the general community or the particular community where the goods are produced, so that its marketing qualifies as an abnormally dangerous activity, it is difficult to imagine how the manufacture and sale of these same goods could be a reasonable activity.

The argument might be made that strict liability should extend to any substantially hazardous commercial enterprise where the party engaging in the activity controls the risks.¹⁷³ But this would be a step down the slope toward absolute liability for any harm caused by a defendant, a theory whose impracticability has already been suggested.¹⁷⁴

C. A Flat Bar on Product-Category Liability vs. Negligence

If courts were to accept the proposition that strict tort liability does not encompass per se claims involving nondefective products, plaintiffs would have to try to classify their suits as claims either for defective design, inadequate warning, or instruction-for-use. Negligence doctrine would obviate the need for this, since classification would be irrelevant. The focus of the inquiry in negligence would be on risk-utility balancing, which would incorporate allegations that a product should never have been marketed.

Negligence theory thus avoids the difficulty of distinguishing between product-category cases and design-defect cases. This becomes critical if product-category liability is not recognized, since the classification given to plaintiff's claim will determine whether it should be dismissed out-of-hand.

In their criticism of product-category liability, Professors Henderson and Twerski demonstrated that the line is not an easy one to draw, especially where plaintiff argues that an alternative design should have been adopted and defendant insists that the claim, in fact, seeks to impose product-category liability; they presented the examples of suits against bicycle manufacturers based, on one hand, upon claims that the handle bars were too short and, on the other hand, based

172. See *supra* note 82 and accompanying text.

173. See Jones, *supra* note 79.

174. See *supra* Part II.D.

upon assertions that defendant should have installed three wheels on its product.¹⁷⁵ In both cases, the risk that caused the harm derived from the product's lack of stability. The authors pointed out that they relied upon intuition to classify the former case as one that "is not attacking the category 'bicycles' but rather a marginal variation within the category," while the latter is in the nature of "a categorical assault upon bicycles."¹⁷⁶

Hence, they would draw a line based upon "degree of substitutability."¹⁷⁷ If plaintiff's position is that defendant should have adopted an alternative design that was a "relatively close substitute for the product as designed by the defendant,"¹⁷⁸ the case would be classified as a design suit and thereby subject to risk-utility balancing. If what plaintiff calls for "is not a very close substitute,"¹⁷⁹ the authors contended that the courts should not reach the merits of the claim, but should enter a judgment for defendant.

What Professors Henderson and Twerski were attempting to do here was to prevent a plaintiff from circumventing a judicial refusal to recognize product-category liability. If there was in fact no conceivable substitute for the article in question, the case would clearly amount to an effort to impose per se liability. A flat ban under this theory of recovery would mandate a dismissal of the claim. By suggesting an alternative design, no matter how it might alter the identity of the product, plaintiff would remain within the parameters of strict-tort product liability.

Henderson and Twerski purport to unmask certain types of design claims as product-category claims and hence subject them to summary dismissal. The line they suggest, based upon intuition and degree, seems somewhat inconsistent with positions previously taken by Professor Henderson in support of clear standards for decision-making in tort cases.¹⁸⁰ The fact that the authors consider efforts to recover against distillers and cigarette manufactures for failure-to-warn as per se liability claims in disguise¹⁸¹ suggests that they would be willing to permit trial judges to dismiss a wide variety of claims by

175. See Henderson & Twerski, *supra* note 6, at 1298-1300.

176. *Id.* at 1299.

177. *Id.*

178. *Id.*

179. *Id.*

180. See James A. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976).

181. See Henderson & Twerski, *supra* note 6, at 1322-26.

using intuition and the malleable degree-of-substitutability test to tar them with the brush of product-category liability.¹⁸²

This approach to product-category liability thus seems to mask a different agenda, inasmuch as it permits the manipulation of the distinction between per se claims and claims based upon defects in design or warnings in order to facilitate dismissals of the latter. What is especially intriguing is that this tactic amounts to a mirror image of the ploy the Consumer Product Safety Commission used when it invoked the banning provision of the Hazardous Substances Act to set what were, in fact, design standards in order to circumvent the procedural obstacles Congress erected around the Commission's authority to promulgate design standards under the Consumer Product Safety Act.¹⁸³

In their hypothetical case of the two-versus-three-wheel bicycle, the critical question would seem to be whether the utility of producing two-wheelers instead of three-wheelers would outweigh the risks inherent in the two-wheeler. This issue would be at the center of a strict liability design case governed by the risk-utility test for defectiveness, as well as at the center of claims asserting negligent design and negligence in the decision to market a two-wheel bicycle.

The utilization of negligence theory in products cases would seem to bypass the roadblock that would result from the limitation of strict liability to situations in which the product in question created an unreasonable danger that could be eliminated by an alternative design or formulation. However, the latest version of the *Restatement of Prod-*

182. An example of how this might work may be imagined from litigation in which plaintiffs, who were injured while riding motorcycles when their bikes turned over and crushed their legs, brought suits alleging that their motorcycles were defective because they lacked crash bars or leg guards—pieces of looped metal tubing that protrude from the motorcycle between the rider's feet and the wheels, and keep the vehicle from falling on the rider's legs in the event of a turnover accident. Under the Henderson-Twerski test, a judge might use his intuitive feeling that bikes with patent safety features like leg guards change the essence of motorcycle riding by reducing the risk factor at the heart of its appeal to devotees, and might classify the case as one of product-category liability, subject to summary dismissal. In other words, riding a motorcycle with leg guards is like riding a tricycle instead of a bicycle.

Treating these cases as design suits, the courts have dismissed some of them and have let others go to the jury. Compare *Hunt v. Harley-Davidson Motor Co.*, 248 S.E.2d 15, 17 (Ga. Ct. App. 1978) (manufacturer has no duty as matter of law to install crash bars to protect motorcycle riders from obvious risks inherent in motorcycle riding); *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993) (under Mississippi law motorcycle without leg guards not unreasonably dangerous as matter of law because danger obvious to ordinary consumer); with *Nicolodi v. Harley Davidson Motor Co.*, 370 So. 2d 68, 73 (Fla. App. 1979) (allegation that failure to install leg guards on motorcycle rendered vehicle unreasonably dangerous stated good cause of action).

183. For example, the Commission used its banning authority under the Hazardous Substances Act to forbid the manufacture of refuse bins that did not comply with enumerated safety standards. See 16 C.F.R. §§ 1301.1-.8 (1996). For a discussion of this standard-setting technique, see Teresa Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 68-69 (1982).

uct Liability may extend the roadblock, since it seeks to require that plaintiffs prove the existence of an alternative design even in negligence cases, where the gist of the claim is that a product was defective at the time of sale or distribution.¹⁸⁴

CONCLUSION

Product-category liability seeks to hold manufacturers responsible for marketing decisions that should not have been made. Hence, negligence would seem to be the proper theory under which these kinds of cases should be brought. If a reasonable person would not have marketed a particular product line, the choice to do so bears the stigma of the type of blameworthiness that lies at the core of negligence doctrine.

It may well be true that if recovery is denied to consumers aware of inherent risks posed by a product they freely purchase or use, the scope of product-category liability will be relatively modest, except insofar as it facilitates the possibility of suits against the manufacturers of handguns.¹⁸⁵ Moreover, plaintiffs will find it tactically advantageous to assert, wherever possible, that the defendant should have taken an alternative course of action, rather than simply refrain from marketing the product line in question. Under this approach, the loss of social utility that would have resulted if the defendant had taken the alternative course of conduct would be less than the actual loss of utility caused by what the defendant did, and hence the plaintiff would have a better chance of convincing the jury that the defendant acted unreasonably.¹⁸⁶

There still will be instances, however, where society would have been better off if defendant had refrained from putting a product on the market, and damage suits using negligence doctrine would usefully complement the legislative and administrative processes as mechanisms to protect the public from the unavoidable hazards posed by these consumer goods.

184. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. n (Proposed Final Draft (Preliminary Version) 1996) ("The rules in this Section . . . define the bases of tort liability for harm caused by product defects existing at time of sale or other distribution. . . . As long as these requisites are met, the traditional doctrinal [category] of negligence . . . may be utilized in characterizing the claim."). For criticism of this limitation, see Gray, *supra* note 164, at 1109-13.

On the other hand, if product-category claims are recognized as involving no allegation of a defect, the restriction in comment n would not apply.

185. If cigarettes are proved to be addictive and tobacco-company officials knew or should have known of this fact, the dimensions of potential per se liability to be imposed upon the manufacturers will greatly expand.

186. See 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 16.9, at 476 (2d ed. 1986).